the licenses issued pursuant to Section 309(j) will service where the race or gender of the licensee will not affect delivery of service to the public."[100] This qualification, however, does indicate a clear recognition that some services will implicate diversity interests. Thus, both the Courts and Congress recognize diversity factors in the context of broadcast and non-broadcast markets, and the potential contributions of non-dominant entities in the furtherance of that interest.

When examined in light of First an Fifth Amendment principles, the potentially exclusionary impact of both comparative hearing and auction methodologies also justify the establishment of economic opportunity objectives as a prophylactic measure. The English auction model the Commission has selected is the most restrictive among the available modeling alternatives, and will necessitate unprecedented intrusion into the microeconomics of the licensee firms compared to other methods of spectrum allocation. The Commission has also announced a decision to freeze comparative hearings for new broadcast radio licenses, and television licenses in the top fifty markets. Arguably, the exclusionary impact of licensing processes on capital constrained bidders takes on an appearance that is analogous to the exclusionary impact of limiting access to the ballot box through imposition of unreasonable filing fees and poll taxes. Thus, the importance of economic opportunity lies in the important need to avoid unreasonable exclusion from

---

[100] H.R. Rep. No. 103-111 at 225.

economic growth and market access opportunities for applicants and consumers.

Ownership and Economic Opportunity.

One important aspect of the FCC's role under the Communications Act concerns for the FCC's responsibility to license communications facilities in the public interest. In this regard, the courts have noted that the Communications Act is more than that of a "traffic officer, policing the wave lengths to prevent stations from interfering with each other... [T]he Act does not restrict the Commission merely to supervision of traffic. It puts upon the Commission the burden of determining the composition of that traffic."[101] And while the "public, not some private, interest, convenience and necessity governs the issuance of licenses,"[102] the guiding principle is that "the [FCC] is entitled to some leeway in choosing which jurisdictional base and which regulatory tools will be most effective in advancing the Congressional objective."[103] Congress has given the FCC numerous additional bases of jurisdiction and various tools to encourage investment in the public interest. The Regulatory Flexibility Act requires agencies to consider the impact of their regulations on small businesses, organizations, and jurisdictions, and explore less restrictive

---

101 NBC v. United States, 319 U.S. 190 (1943).

102 Ashbacker v. FCC, 326 U.S. 327, 333 (1945)

103 Philadelphia Television Broadcasting Co. v. FCC 359 F. 2d 282-285 (D.C. Cir. 1966).

alternatives where they conclude regulations would have an adverse economic impact.[104] The Commission has substantial leeway under its general legislative scheme to use flexible regulatory classifications,[105] licensing preferences,[106] and spectrum allocation arrangements,[107] and capital gains deferrals,[108] to encourage non-dominant investment in the telecommunications economy.[109] Finally, the Licensing and Spectrum Allocation Act of 1993, the Cable Television Consumer Protection and Competition Act of 1993, and the Continuing Appropriations Acts, gives the Commission broad discretion to remove impediments to non-dominant ownership. There is considerable empirical evidence suggesting that measures to ensure non-dominant ownership and participation can be tailored to substantially further the national economic opportunity objective.

As reflected in both the Spectrum Act, and the Cable Act, Congress has identified several regulatory tools to promote

---

[104] For a critical discusion of regulatory flexibility processes, see Thoma O. McGarity, Regultory Analysis and Regulatory Reform, Texas Law Review, Vol 65, No. 7, June 1987, p. 1243.

[105] See, Philadelphia Television (substitution of Title II for Tile III jurisdiction).

[106] Compare, National Black Media Coalition v. FCC, 791 F. 2d 1016 (2nd Cir. 1986) (unreasonable deletion of non-technical licensing criteria for clear channel radio stations).

[107] Radio Relay v. FCC, 409 F. 2d 322 (2d Cir. 1969) (separate spectrum allocations designated wireline entities).

[108] Kansas State Network v. FCC, 720 F2d 185 (D.C. Cir. 1982) (authority to issue tax certificates allowing recipients to defer recognition of capital gains).

[109] FCC v. Beach Communications, Inc., 61 U.S.L.W. 45323 (U.S. June 1, 1993).

consumer welfare which do not place increased reliance on large scale market forces. One is to provide incentives for existing licensees to assist in the diversification of ownership. The other is to "increase the chance that qualified minority applicants [and other applicants of the designated groups] would obtain new stations as they became available."[110] The SBAC report used essentially the same approach in advancing proposals in this report, and in its previous report, to encourage licensing opportunities and, strategic alliance opportunities.

Public policy relies primarily on ownership to further the public interest, and ownership of telecommunications facilities has long been the preferred form of participation among underrepresented business communities. While low cost alternatives to broadcast and wireline telecommunications facilities do exist - e.g. local multichannel distribution service (LMDS) or Multipoint Multichannel Distribution Service (MMDS) - the relative inaccessibility or cost of capital, places a major constraint on minority ownership opportunities especially in capital intensive market segments like personal communications services and cable television.

Ownership by means of strategic alliance also has several economic and financial advantages compared to stand alone ownership and control. In particular, strategic alliances allow entities with complimentary advantages and disadvantages to combine their

---

[110] Brief of the United States Senate as Amicus Curea in <u>Metro Broadcasting, Inc. v. FCC</u> (cites omitted) at p. 34.

resources to accomplish goals that would otherwise be unattainable to the individual allies. Probably the most customary form of strategic alliance, the joint venture or limited partnership, offsets capital formation problems by spreading costs and capital contributions over multiple partners. Strategic alliances can also take other forms. Spectrum sharing arrangements, such as those the Commission employed in adopting ownership policies for satellite transponders, are favorable to small users.

Procurement-related incentives and performance requirements are another way that government encourages and supports technological innovation and economic development. Many opportunities in the market for telecommunications equipment and services are unregulated. Deployment of emerging technologies for the information highway will stimulate opportunities for equipment manufacturers, programmers, and construction contractors and subcontractors. Without programs to encourage vending opportunities, many minority and female owned firms would not be able to enjoy the benefits of telecommunications economy.

FCC Discretion to Classify Designated Entities

Background. The designation of eligibility criteria for non-dominant status presents several complicated issues, however, in light of the requirements of the Small Business Credit and Business Enhancement Act of 1992. The 1992 Act requires all Federal agencies to obtain the approval of the SBA Administrator before promulgating agency specific size standards, unless the agency acts pursuant to direct statutory authorization,[111] and the SBA has adopted proposals to amend 13 CFR Part 121 to implement those provisions. This issue has both practical and legal implications for the dockets the SBAC reviewed. First, the Commission is naturally obligated to observe any applicable legal requirements governing regulatory preferences. Second, to the extent the commission elects to adopt size standards, regulations adopted must give the intended beneficiaries of the relief adequate notice of eligibility criteria for planning purposes, especially where new services such as PCS are involved.

Discussion. Presently, the FCC administers size standards for the broadcast and telephone industries, and is requesting comments on size standard issues in two other dockets to request comment on SBA and non-SBA size criteria. Size standards for the broadcast industry were adopted in 1992 as a part of a multiple ownership rule that permits a single entity to own an attributable interest in up to 21 AM and FM radio stations if three of those stations are controlled by small business entities or are more than 50 percent owned by one or more members of a minority group.[112] For purposes of this rule, firms with less than $500,000 in revenues and under $1,000,000 in assets are considered small. The Commission also

---

[111] Under the SBA's proposed regulations to implement the Act, an agency may prescribe a size standard different from that determined by the SBA under three conditions. First, the standard is being proposed after an opportunity for notice and comment. Second, the standards provide for size determinations of concerns providing services based on average gross receipts over a period not less than three years. Third, the size standard must be approved by the SBA Administrator.

[112] Report and Order in MM Docket No. 91-140 (Released August 5, 1993).

administers size standards for the purpose of reducing rate regulation burdens on small telephone companies. Under these regulations, companies with 50,000 access lines or less qualify as small, however, this designation does not qualify rural telephone companies for SBA benefits.[113]

Size criteria are also the subject of two other notice and comment proceedings. Pursuant to the Spectrum Act, the FCC is requesting comment on whether to rely on definitions devised by the SBA for purposes of implementing the Act's small business provisions. See, e.g. 47 U.S.C. 309(j)(3).[114] Similarly, the Commission has requested comment on whether eligibility for small system relief under the 1992 Cable Act should be extended to all small systems or only those that are not affiliated with or controlled by large Multiple System Operators.[115] Under the Cable Act, systems with less than 1,000 subscribers qualify as small systems. Over the past decade, disappointed applicant have repeatedly invoked this standard to challenge racial and gender preferences.

It does not appear that the 1992 Act manifested congressional intent to modify the FCC's exclusive jurisdiction, under the Communications Act of 1934, as amended, to regulate communications

---

113 Report and Order in CC Docket No. 86-467 (Released June 29, 1987), 2 FCC Rcd. 3811, 3815.

114 Notice of Proposed Rulemaking in PP Docket No. 93-253 (Adopted September 23, 1993).

115 Memorandum Opinion and Order and Further Notice of Proposed Rulemaking in MM Docket No. 92-266 (Released August 10, 1993), pp. 11 -13.

commerce by wire and radio.[116] The legislative scheme established by the 1992 Cable Act and the 1993 Spectrum Act appear to confirm FCC discretion to establish standards necessary to carry out the purposes of those acts. As noted before, Congress delegated explicit authority to the FCC to promote economic opportunities for small businesses under the Spectrum Act. The 1992 Cable Act authorizes the Commission to provide rate regulation relief for small cable systems. Congress established strict deadlines for implementation of both Acts. It is inconceivable that Congress believed that the process could be completed sufficiently in advance of the deadlines for implementation of rate regulations and competitive bidding to provide notice to affected parties. The text and legislative histories of these Acts, moreover, appear to be silent with respect to mandatory compliance with SBA procedural requirements. Under these circumstances, it may unreasonable to countenance delays for otherwise necessary relief while the SBA implements new rules.

The conclusion that the FCC retains limited size standard discretion is consistent with prior administrative determinations by both the FCC and the SBA to the effect that certain entities under FCC jurisdiction are not subject to the provisions of the Small Business Act. For example, as noted above, the Commission has

---

[116] The issue of whether the FCC must comply with SBA size standard procedures has been raised in comments responding to our further notice in the cable rate regulation proceeding. Under these circumstances, we believe it would be inappropriate to reach any final conclusions on this point prior to our review of the record in that proceeding.

previously concluded that telephone companies are not subject to the provisions of the Small Business Act since these entities enjoy ubiquitous access to local subscribers, and are therefore dominant in their local service areas.[117] It must also be noted that the SBA enforces an "opinion molder" rule which strictly prohibits extension of direct SBA loans and loan guarantees to entities engaged in the dissemination of information, including broadcasters, cable system operators, and other FCC-regulated mass communications facilities.[118] Since the rationale for the opinion molder rule is predicated on the SBA's asserted interest in avoiding non-entanglement with entities engaged in the exercise of first amendment rights, we see no inconsistency between the recent amendments to the Small Business Act and the inference that the FCC has jurisdiction to establish size standards for mass communications entities it regulates pursuant to the Communications Act. For these reasons, the SBAC is not persuaded upon analysis that the Business Enhancement Act unambiguously requires the FCC to receive SBA approval before implementing any size standard.

Conclusion

The SBAC staff review of applicable case law authorities suggests that a persuasive justification for utilization of non-dominant firms owned by minorities and women is an essential

---

[117] Report and Order in CC Docket No. 86-467, supra, footnote 2.

[118] Mission Trace Investments, Ltd. v. SBA, 622 F. Supp. 687 (D.C. Colo. 1985) (articulating unconstitutionality of SBA opinion molder rule)

prerequisite for the adoption of the policies that extend differential treatment to designated non-dominant entities as a matter of policy. Evidence is also needed to show that the policies to encourage non-dominant ownership are substantially related to economic opportunities in that they encourage larger non-dominant use of radio in new and existing markets, correct present effects of past inequities, and deter potential undue concentration of ownership. Finally, eligibility criteria for preference policies must be narrowly tailored. We address each of these issues below.

The analysis above indicates to us that the Commisison has adequate regulatory tools and jurisdictional bases at its disposal to remove significant impediments to participation and ownership for designated non-dominant entities. The SBAC perceives a need for economic opportunity to achieve universal service goals and larger use of radio, as well as to correct past economic disadvantage. Technology diffusion is a critical component of each of these goals. Our analysis also indicates that measures to encourage participation by non-dominant entities in new and existing markets are likely to further technology diffusion as well as economic opportnities for designated entities. Finally, the SBAC supports the Commission's decision to narrowly tailor its efforts in a way that assists segments of non-dominant universe that are most likely to face capital constraints. In the following section of our report, we examine specific regulatory flexibility options available to the Commission.

OVERVIEW OF REGULATORY FLEXIBILITY OPTIONS

The manner in which the Commission balances competing goals of promoting efficient spectrum use, and assuring that competitive bidding is implemented in the least restrictive manner possible, will have farreaching effects on the ability of designated entities to promote technology diffusion. As indicated before, the SBAC is concerned that implementation of measures to accelerate deployment without commensurate measures to encourage technology diffusion may detract from the public's ability to capture greater value from spectrum use through employment opportunities and innovation of new services, products, and technologies. Because the choice of options is complicated by numerous interrelated technical and non-technical issues, it is important to tailor the regulatory structure in a way that remedies past inequities and encourages non-dominant diffusion. As explained below, opportunities for licensing and strategic alliances, including vending programs, can be enhanced through multi-tier classifications of designated entities, capital investment initiatives, spectrum use-diversity management, information enterprise zones, revision of minority ownership policies, and regulatory forbearance. Revision of FCC minority ownership policies is particularly important to reflect the substantial changes that have intervened since the 1982 policy statement, and to ensure minority firms are able to benefit from the other measures we recommend.

Multi-Tier Regulatory Classifications

One important implication of the SBAC's conclusion that the Commission should exercise independent size standard discretion to avoid many complicated problems that would otherwise have to be addressed in terms of Small Business Act procedures.[119] The SBA defines a small business as a firm that is non-dominant in its field and independently owned and operated. With respect to the first element, the SBAC finds that non-dominant status in the field of communications is a common characteristic of businesses eligible for financial assistance from SBA chartered small business investment companies,[120] and businesses owned by minorities and women.[121] Consistent with SBA guidelines, the SBAC also endorses waivers for non-dominant entities that agree to use federal

---

[119] For example, while a construction recognizing Commission discretion would relieve the FCC of SBA approval requirements, it would not preclude discretion to extend discretionary relief to small cable MSOs based on cost considerations related to size. Adherence to the policy of treating small telephone companies as dominant entities, moreover, obviates the need to undertake the complicated task of establishing criteria to govern their eligibility for relief as small businesses.

[120] SBIC financial assistance is available to firms with a net worth of $6.0 million with average net income of not more than $2.0 million. The SBAC understands that the SBA is revising its criteria to raise net worth levels to $18 million and net income levels to $6 million. See SBAC PCS Report, at pp. 20-21.

[121] This finding, however, does not extend to pioneer's preference recipients. Likewise, while the SBAC supports open entry opportunities for rural telephone companies, their dominant status and eligibility for Rural Electrification Administration assistance under existing policy makes it inappropriate to extend preferences for non-dominant entities to these firms.

assistance in labor surplus areas and redevelopment zones.[122] Regarding independent ownership, the SBAC recommends that the criteria include provisions granting eligibility to non-dominant consortia, and other non-dominant entities that enter into debt finance arrangements with dominant entities.[123]

The SBAC also believes that the Commission should judiciously limit its use of small business preferences by relying on alternatives such as multiple ownership rules, and spectrum sharing arrangements. In arriving at this conclusion, the SBAC recognizes the need to strike a balance between the need to remove regulatory and financial impediments through narrowly tailored measures, and the need to exercise restraint for practical as well as legal reasons. "The health of small business is determined not only by the number that succeed, but also from the number that fail. To stifle the creative forces arising from the possibility of failure may serve only to keep inefficient entities alive. Moreover, the natural process of business growth is hampered if smallness is

---

[122] Waivers would be available for PCS bidders with a net worth of up to $40,000,000, and not more than 250 employees.

[123] The SBAC also supports incentives to encourage large entities to extend equity ownership opportunities to non-dominant entities. These incentives fall outside the scope of the Small Business Act since affiliation with dominant entities, by definition, disqualify non-dominant entities for small business status. In our view, these types of incentives are necessary and provide an additional reason for the Commission to assert size standard discretion independent of the Small Business Act procedures, at least in the case of PCS as we discuss further below.

rewarded by deregulation, because firms are then encouraged to maintain a sub-optimal economic size."[124]

Equally important, as the Commission observed in an analogous context, "[i]t may be ... that the award of a fixed relative preference [to all non-dominant entities] would actually reduce the likelihood that a minority or female applicant would be the winner ... "[125] This observation is applicable here to the extent that constraints involving cost and availability of capital differ in their impact on non-dominant entities. For this reason, the tailoring of any preferences for non-dominant entities should address regulatory or financial constraints affecting participation by local businesses and businesses owned by members of minority groups and females.

Due to substantial risk and consequences of continued exclusion of minority groups, the SBAC voted in its September 1993 meeting to recommend that some preferences should be tailored to remove impediments that tend to exclude businesses owned by members of minority groups. In an analogous context, the Commission also noted that it has not concluded that the historical and contemporary disadvantaged status of women is of the same order, or has the same contemporary consequences, which would justify inclusion of amajority of the nation's population in a preferential

---

[124] Verkul, Paul, "A Critical Guide to The Regulatory Flexibility Act," Duke Law Journal, April 1982, p. 213, 224.

[125] Random Selection Report and Order, 89 F.C.C. 2d 257, 281 (1982).

category..."[126] Our review of Federal Reserve efforts to eradicate redlining leads us to conclude that the Commission's earlier conclusions regarding the level of disadvantagement suffered by members of minority groups continues to be accurate.[127]

Communications Investment Initiatives

Measures to increase access to capital are perhaps the single most important component of the Commission's efforts to increase economic growth and access in new and existing markets. In the report on ET Docket 90-314, the SBAC concluded that lack of access to capital is a major obstacle to telecommunications market entry by small and minority firms. In this report, we qualified that finding by drawing a distinction between publicly traded non-dominant entities, and pre-IPO entities, especially those that are underrepresented in telecommunications ownership. We set forth several new and modified capital development proposals based on this distinction below.

Bank Financing. The CRA is a relatively untried vehicle for encouraging bank loans for non-dominant telecommunications entities serving economically distressed communities. The CRA provides that

---

[126] NTIA Petition for Policy Statement, 69 FCC 2d 1591, 1593 (1978).

[127] While recognizing the peculiar plight of minority communities, and concerns about including women in a preferential category, the Commission has noted that it has been "receptive to factual showings in specific cases which indicate a need for preferential incentives to encourage female involvement/ownership." We think this continues to be a reasonable approach in light of the economic opportunity mandates in the Spectrum Act.

"regulated institutions have continuing and affirmative obligations to help meet the credit needs of the local communities in which they are chartered."[128] The Act's mandatory review of efforts by covered financial institutions to extend credit to all areas of their communities should therefore include lending activity involving local broadcasters and other communications enterprises.

Although the Federal Reserve detected a number of problems in its examination of HMDA data, it also noted many positive actions to help improve access to credit that could be used in communications finance. According some sources, CRA compliance contributed $30 billion in new commitments or about one percent of the total $3.6 trillion in assets covered by the CRA.[129] According to the Federal Reserve, critical self-analysis, second reviews of lending decisions affecting minority applicants, credit education projects, and equity investment consortia, account for most of the increases.

These data suggest that successful efforts to leverage even a small part of the total Federal reserve assets could significantly expand access to bank capital for communications development. In order for this approach to work, however, additional steps will be needed. First, the public, the Federal Reserve and its member banks, would have to have a better understanding of methods for complying with CRA with debt financing or formation of equity investment consortia for communications services. Second, SBA loan

---

128 See, 12 U.S.C. Section 2901 (a) (3).

129 Garwood and Smith, p. 266.

guarantees would be useful to insulate applicants from the perception of risks associated with investment in FCC licensed facilities.

Equity Capital. The Commission's attribution rules and financial certification requirements are important determinants of an applicant's ability to attract equity capital. While policies and rules in these areas are designed to protect the public interest, the SBAC concerned that these provisions may also operate to the detriment of the public if applied in an overly stringent manner. For example, in the broadcast context, it appears that financial certification that deny financial institution status to SBA chartered Small Business Investment Companies (SBICs), and Specialized SBICs, may confuse legitimate applicants, and expose those applicants to opportunistic attacks by competing parties. As a result, while these policies may serve the general interest in avoiding speculative applications, in some cases they may also inadvertently erect barriers for capable and qualified applicants who seek to provide communications services that will contribute to economic growth and access in their communities. By treating CRA-authorized Community Development Consortia, SBICs and Specialized SBICs as financial institutions, and allowing applicants to demonstrate their qualifications with "highly confident letters," letters of intent and commitment letters from those entities, the Commission can remove a major impediment to licensing opportunities. The Commission can also promote opportunities by waiving attribution rules governing where the waiver will facilitate non-dominant ownership of licensed facilities.

Commuications Capital Fund. The SBAC urges the Commission to endorse its proposal to establish a national "Communication Capital Fund". ("CCF" or "Fund") Estimates of projected revenues from spectrum auction reach as high as $12 billion dollars. The purposes of the fund is to earmark a percentage of the projected auction revenues to act as a lender of last resort, loan guarantor, and a secondary market for debt securities.

As indicated before, the discontinuation of SBA loans and loan guarantees for small media business eliminated a significant source of debt financing for small market investments. SBA staff indicated that the SBA may revisit this issue in the near future, and we commend the SBA for its foresight in this regard. Even if exceptions to the opinion Molder Rule are reinstated however, SBA loans and loan guarantees will be inefficient to meet the credit needs of designated non-dominant entities. SBA loans are administered on a first-come, first serve basis, so many eligible borrowers could be denied assistance - not based on the merits of their application - but the timing of submission. Also SBA loans are subject to ceilings which may unduly limit the investment options of those dependent on financial assistance. A communication capital fund could significantly enhance assistance available from the SBA and SBA chartered Small Business Investment Companies.

The fund could also encourage securitization of telecommunications loans. In a securitization, loans are placed in a pool and securities are issued. The securities entitle the holders to the proceeds of the principal and interest payments flowing from the underlying loan. Securitization improves liquidity for originators of the loans. Investors are able to acquire securities that require no management of the underlying loan.

Although several initiatives are already underway to encourage securitization of loans for small businesses generally, these initiatives may be insufficient to assist designated entities. Securitization works best when there is a high volume of standardized loans, such as loans for housing, cars, or credit card purchases. Standardization affects investors' assessment of the collateral and income producing nature of the investment. FCC licensees face unique disadvantages in this reagrd since licenses cannot be collateralized and the income producing nature of spectrum investment is something poorly understood among lenders and institutional investors. As a result, the telecommunication sector of the small business community may receive few of the intended benefits of securitization unless additional steps are taken. Without a specialized market for spectrum businesses, lenders may continue to avoid spectrum enterprises altogether or price their services at premium rates to compensate for the loss of flexibility.

A secondary market operated by a government chartered corporation moreover, has similar benefits for government agencies beside the SBA that do extend loans to spectrum business. If authorized to hold FCC originated installment loans, for example, the fund could help avoid entangling the FCC in debt collection matters that operate at cross purposes with its First Amendment responsibilities. For all these reasons, the SBAC urges the Commission to endorse this proposal in connection with legislative recommendations to Congress.

Revision of Minority Ownership Policies. Two basic developments have intervened since the adopted policies to encourage diversity by means of minority ownership. A decade ago that need to be carefull was part of any major effort to promote economic growth and access. First, as new telecommunications services are being developed to merge information and message transmission with the delivery of entertainment services, the minority ownership policies have been limited in their applicability to broadcasting and cable.[130] Compared to use of tax certificates for acquisition of radio stations, however, relatively few broadcast television or cable television systems have been acquired with tax certificates due to the extremely capital intensive nature of those industries.

Second, revisions are also needed in the current investment climate to attract equity investment sources for new acquisitions or to restructure debt obligations as they mature. A study by the Leadership Council on Advertising Issues confirmed that "radio

---

[130] Letter of James Winston, Executive Director, National Association of Black Owned Broadcasters, to Acting Chairman, James H. Quello, September 1993, at p. 2.

stations serving minority audiences are often not very secure financially, and are disproportionately affected by changes in advertising revenues."[131] The study found that a 5 percent fall in advertising revenues in 1993 would result in a 2.1 percent loss of radio stations overall, but would lower the number of black formatted stations by 4.1 percent and the number of Hispanic formatted stations by 5.6 percent. Reforms in the regulation of cable television rates also have implications for investment in new infrastructure by non-dominant cable systems operators and MSOs. In any event, without significant revisions in the recommended areas, ownership of FCC media facilities will become increasingly impracticable for many minority firms.

Issuance of minority tax certificates to a broader class of financial participants is another significant measure that could substantially increase capitalization opportunities for minority owned buyers, while increasing liquidity for sellers of radio properties and other facilities that are ancillary to broadcasting. The utility of the minority tax certificate could be enhanced in several ways: (1) issuing tax certificates for debenture sales by SBA-licensed small business investment companies that assist small communications ventures; (2) expanding the policy to encourage debt financing or transactions involving stations that are not being sold at a profit; (3) eliminating the required one-year limitation period for qualifying investments under the 1982 Minority Ownership

---

[131] Penner and Lilley, Economic and Social Impacts of Media Advertising (Leadership Council on Advertising Issues, 1989) pp. 93, 103.

Policy Statement; (4) extending tax certificate treatment to participants in multi-party transactions, initial public offerings, and multiple technology media transactions; (5) establish an FCC-IRS Working Group to explore strategies for liberalizing IRS regulations applicable to transactions involving FCC regulated facilities.[132]

Spectrum Use-Diversity Management

The matter of how the Commission can use its power to prescribe bandwidth assignments to promote access and growth is one of the most controversial issues the Commission will need to resolve, not only in the context of PCS, but eventually in the context of broadband video services and broadcasting as well. Generally, the options for using the bandwidth assignment process to promote economic opportunity include spectrum set-asides, and variants on other strategic alliance arrangements such as spectrum sharing, and competitive bidding exemptions. The challenge here is to balance the goal of promoting efficient use of spectrum with the doctrinal mandates to implement competitive bidding in the least restrictive manner possible.

In the SBAC report on PCS, the first occasion that the Committee has had to consider bandwidth assignment issues, the Committee recommended that the FCC consider option of allocating

[132] For an extensive treatment of Section 1071 tax certificates, see generally, Erwin Krasnow, William Kennard, and Susan O'Hearn Temkin, "Maximizing The Benefits of Tax Certificates in Broadcast and Cable Ventures," Hastings Communications and Entertainment Law Journal, Volume 13, No. 4, Summer 1991.

equal spectrum blocks, including one prescribed for use by designated non-dominant entities, as a way to implement Congressional spectrum allocation objectives. The Commission requested comment on the proposal, and subsequently adopted the option as one of several in a menu of option for implementing competitive bidding. In theory, the set-aside option as set forth in the Broadband PCS allocation plan, which presently assigns 2 30 MHZ blocks to MTA service areas, and one 20 and 10 MHz blocks to BTA service areas, is designed to "ensure" designated entity participation, and efficient spectrum use.

A number of experts and commenters question the public interest benefits of proceeding further to consider the set-aside option. Questions arise as to the statutory interpretation underlying the set-aside plan. Questions also arise about the economic feasibility of using a 20 MHz BTA to compete against two possibly entrenched MTA-based competitors with 30 MHz allocations, especially considering the need to absorb costs of spectrum auctions and relocation of 2 GHz microwave incumbents. In a similar vein, questions also arise as to whether BTA licenses will be bankable in view of stated preferences by venture capital firm representatives for large scale PCS operations. Finally, questions arise about the availability, cost, interoperability of customer handsets for BTA frequencies. In view of these concerns, auction proponents favor price preferences and performance requirements over set-asides in order to maximize auction revenues and assure that the pool of bidders is sufficiently qualified and committed to engage in efficient use of spectrum. Due to these types of concerns, the set-aside option is presently a matter upon which reasonable minds differ sharply.

To avoid the untenable position of recommending an option that, according its critics, would invite inefficient spectrum use while at the same time disserving consumers and ghettoizing designated entities, the SBAC and its professional staff have consulted extensively with prospective bidders about strategies they would pursue in order to operate successfully within the constraints of the present allocation scheme. These consultations reveal a number of considerations that are easily overlooked by critics and advocates of set-asides alike.

For example, consultations reveal the view that negotiated aggregation privileges would allow MTA and BTA licensees to achieve more efficient use of spectrum, and that designated entity groups have formed to pursue volume buying arrangements and voluntary standards and protocols to promote efficient spectrum use. Consultations also reveal that interest in PCS investment opportunities is among SBA chartered Specialized Small Business Investment Companies (SSBICs) is particularly strong. The likelihood that SSBICs will expand capitalization options for designated entities, moreover, is bolstered by recent Congressional legislation authorizing favorable treatment of SSBIC capital gains along the lines of the tax certificate proposal outlined in the SBAC PCS report. Literature searches and consultations with small equipment manufacturers reveal interest in additional measures to ensure access to spectrum needed for innovation of new products, services and technologies. Finally, there is broad consensus, at least within the ranks of those who commented in favor of safeguards for designated entities, than the set-aside option is one of the "other procedures" the Commission might use to promote economic opportunity in the context of prescribing bandwidth assignments.

Based on these considerations, it appears that the deletion of BTA spectrum blocks in a manner that inadequately considers the public interest benefits of designated entity participation could have unexpected and irreparable chilling effects on diffusion of services and products to the public at large by those entities. With the exception of exemptions from competitive bidding, no option has been brought to the SBAC's attention which would in our judgement more effectively ensure access to products, services and technologies supplied by designated entities than the set-aside option.

More recently, NTIA devoted special attention to this option in its U.S. Spectrum Management Policy Report.

As DOJ/Anti-Trust states in addressing this issue: "It is [an] accepted principle of welfare economics that the government should subsidize those goods and services where the social benefit is greater than the private benefit.." As DOJ/Anti- Trust suggests, spectrum could continue to be set-aside for certain socially desirable services as a matter of government policy, even while market principles were applied to other parts of the spectrum." For example, in land use management, substantial tracts of land are routinely set-aside for public parks or other public uses, even while an active market system operates in other areas of real estate.. moreover, a market